Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

No. 96-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

GEORGE N. TOMPKINS, JR.
ANDREW J. HARAKAS*
TOMPKINS, HARAKAS, ELSASSER & TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Counsel for Petitioner KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
A. KAL Properly Addressed in the Court Below the Availability of Nonpecuniary Pre-Death Pain and Suffering Damages in Light of *Zicherman*	1
B. Under the Warsaw Convention "Compensable Harm Is to be Determined by Domestic Law"	2
C. KAL Has Never Approved of the Cases Allowing DOHSA to Be Supplemented With Nonpecuniary Pre-Death Pain and Suffering Damages Under General Maritime Law	5
D. The Court Below Effectively Passed Upon the Recoverability of Pre-Death Pain and Suffering Damages	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	PAGE
Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73 (1990)	6, 7
Bickel v. Korean Air Lines, 83 F.3d 127 (6th Cir. 1996)("*Bickel I*"), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996)("*Bickel II*")	*passim*
Bowden v. Korean Air Lines, 814 F. Supp. 592 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996)	3
Forman v. Korean Air Lines, 84 F.3d 446 (D.C. Cir. 1996), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-530)	6
In re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989, 783 F. Supp. 1261 (N.D. Cal. 1992) ("*Hawaii II*")	5
In re Air Disaster Near Honolulu, Hawaii, on Feb. 24, 1989, 792 F. Supp. 1541 (N.D. Cal. 1990) ("*Hawaii I*")	5
In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993)	5
In re Korean Air Lines Disaster of Sept. 1, 1983, 935 F. Supp. 10 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).	4
Lebron v. Nat'l R.R. Passenger Corp., 115 S. Ct. 961 (1995)	6

PAGE

Saavedra v. Korean Air Lines, 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-623) 4, 5

Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996) ..... *passim*

Treaties and Statutes:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (reprinted in note following 49 U.S.C. § 40105) 1, 2, 3, 6

Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* ..... *passim*

Petitioner KOREAN AIR LINES CO., LTD. ("KAL") submits this Reply Brief to address the arguments of Respondents and in further support of the Petition for a Writ of Certiorari.

A. KAL Properly Addressed in the Court Below the Availability of Nonpecuniary Pre-Death Pain and Suffering Damages in Light of *Zicherman*

Respondents erroneously state that following the issuance of the Order of the court below directing the parties to file supplemental briefs to address the effect of *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), on the pending appeals, KAL "took the opportunity to raise, for the first time in the Sixth Circuit proceedings," the issue of whether the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761, precludes nonpecuniary pre-death pain and suffering damages in an action governed by the Warsaw Convention.[1] Respondents' Brief in Opposition ("Opp.") at 8. Respondents disregard the fact that the court below directed the parties to file supplemental briefs only after KAL had requested permission to submit a supplemental brief to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. *See* Order (6th Cir. Jan. 26, 1996) (A 31a-32a).[2] As a result, both KAL and Respondents fully addressed, in their respective supplemental briefs, the substantive issue of whether nonpecuniary pre-death pain and suffering damages are recoverable in these cases. Thus, KAL did not improperly raise or address the issue in the supplemental brief. Rather, KAL addressed the issue pursuant to the express direction of the court below.

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105).

[2] References preceded by "A" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

B. Under the Warsaw Convention "Compensable Harm Is to be Determined by Domestic Law"[3]

The motivating factor underlying the decision on rehearing of the court below in *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) ("*Bickel II*"), was to mitigate the perceived harshness in these cases of applying the pecuniary loss standard of DOHSA. On rehearing, the court below (2-1) invoked the procedural waiver rule, twice previously rejected by the court below, to circumvent the impact of *Zicherman* and avoid the practical but correct result of *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996) ("*Bickel I*").[4] As the dissent in *Bickel II* explained:

> After carefully reviewing the majority's opinion, I have little doubt that the majority and I do not disagree very much about the harshness of the result in this case if DOHSA were to be exclusively applied. *But as a federal judge, and not a federal legislator, I am bound to apply DOHSA, not as may seem "just" to me, but as it is written, and as it has been interpreted by the highest judicial authority in the land.* And there is simply nothing in the language of DOHSA and nothing in *Zicherman* (or any other case to which the majority points) that leads me to believe there is any principled way to avoid the conclusion that there is no basis in the law for the pre-death pain and suffering awards which today's majority upholds. Yet, the majority defaults KAL and holds that it must pay damages that are not available as a matter of law. In doing so, the majority rests its judg-

---

[3] *Zicherman*, 116 S. Ct. at 635.

[4] Respondents' rehearing petition in the court below presented the exact same arguments and authority as to waiver as were presented twice previously and rejected by the unanimous Panel in *Bickel I*. The only new "argument" presented by Respondents on rehearing was that the result of the unanimous decision in *Bickel I* was to strike all nonpecuniary damage awards and leave all but one of the plaintiffs with no recoverable damages.

> ment not even on the shifting sands of its understandable desire to do equity in these cases. Rather, the majority constructs this judgment "upstairs above a vacant lot."

Bickel II, 96 F.3d at 158-59 (Batchelder, J. dissenting) (emphasis added and footnote omitted) (A 16a-17a).

Even Respondents *do not* dispute that the decision of the district court allowing nonpecuniary damages for pre-death pain and suffering is incorrect. *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993) (A 41a-44a). This is because the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages was Article 17 of the Warsaw Convention and the Court in *Zicherman* unequivocally rejected the view that any types of damages are recoverable directly under Article 17 of the Convention. *Zicherman*, 116 S. Ct. at 632-635. Nevertheless, Respondents argue that KAL "seriously misstates the *Zicherman* holding" and that the court below was not required to accord *Zicherman* "precedential effect" because *Zicherman* did not directly address survival damages. Opp. at 15.

The Court in *Zicherman* found that the Convention provides "nothing more than a pass-through, authorizing [courts] to apply the law that would govern in the absence of the Warsaw Convention." 116 S. Ct. at 636. The Court's holding is not limited to wrongful death and loss of society damages, as argued by Respondents (Opp. at 15), but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention.

The question that confronted the court below was whether nonpecuniary pre-death pain and suffering damages are recoverable under "the law that would govern in the absence of the Warsaw Convention." *Zicherman*, 116 S. Ct. at 636. Applying *Zicherman*, the court in *Bickel I* found that (1) the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages, and (2) because the court could not perceive any distinction that the Supreme Court in

Zicherman would have approved, that would permit recovery of one type of nonpecuniary damage and not another, nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA. *Bickel I*, 83 F.3d at 132 (A 26a-28a); *accord Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-623); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

Despite the clear directive of the Court in *Zicherman* and the fact that both parties, pursuant to the direction of the court below, fully briefed the issue in their respective supplemental briefs, the court below on rehearing (2-1) held that it would not address the argument raised by KAL as a result of *Zicherman*. The court in *Bickel II* held that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153-54 (A 3a-5a).

Respondents and the court below in *Bickel II* fail to give effect to the full holding of *Zicherman*. As the dissent in *Bickel II* aptly stated:

> [W]e are bound by the principles of *Zicherman*, and I think that there is no getting around the flat, unambiguous holding of *Zicherman* that where DOHSA governs (as it, without question, does here), it governs exclusively; it provides the sole source of damages recoverable; and permits only pecuniary damages. . . .
>
> * * *
>
> *Zicherman*, whatever else may be said of it, clarified the law relative to non-pecuniary damages available under DOHSA.

Bickel II, 96 F.3d at 157-58 (Batchelder, J. dissenting) (A 12a-14a).

For this reason, the decision in *Bickel II* conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-623), where the court, in circumstances identical to the cases herein, found that, in light of *Zicherman*, it was "compelled" to hold that nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA. *Id.* at 554.

C. KAL Has Never Approved of the Cases Allowing DOHSA to Be Supplemented With Nonpecuniary Pre-Death Pain and Suffering Damages Under General Maritime Law

Contrary to Respondents' argument (Opp. at 11), KAL never has cited cases "with approval" or argued that nonpecuniary damages for pre-death pain and suffering properly are available under general maritime as a supplement to the pecuniary loss remedy of DOHSA. In its reply brief, submitted to the court below, KAL addressed several cases relied upon by Respondents to support the award of nonpecuniary loss of society damages. *See In re Air Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 792 F. Supp. 1541, 1546 (N.D. Cal. 1990) ("*Hawaii I*"); *In re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 783 F. Supp. 1261 (N.D. Cal. 1992) ("*Hawaii II*"); *In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993).[5] KAL stated simply that Respondents ignored that these cases did not address the question whether loss of society damages may

---

[5] The court in *Hawaii I* held that nonpecuniary damages for pre-death pain and suffering are *impermissible* where DOHSA applies, but subsequently held in *Hawaii II* that such damages are recoverable on the basis of the Convention alone. The rationale of *Hawaii II* has now been rejected by the Court in *Zicherman*.

be recovered in an action governed by DOHSA and the Warsaw Convention.

D. The Court Below Effectively Passed Upon the Recoverability of Pre-Death Pain and Suffering Damages

Respondents argue that, while the second question presented for review by KAL is "undeniably an issue of some moment", the Court should not review the question in these cases because the court below declined to address the substantive issue of whether nonpecuniary pre-death pain and suffering damages are available under DOHSA following *Zicherman*. Opp. at 17.

Respondents ignore that the court below directly addressed KAL's argument in *Bickel I* and held (3-0) that "the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases." *Bickel I*, 83 F.3d at 132 (A 27a). Unlike the situation in *Forman v. Korean Air Lines*, 84 F.3d 446, 448 (D.C. Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996), where the D.C. Circuit declined to address the argument, stating that it was denied the opportunity to receive "full briefing", the court below found the supplemental briefs adequate and first rendered a decision. *Bickel I*, 83 F.3d at 132.

Even on rehearing, the court below effectively passed upon the issue of the legal recoverability of pre-death pain and suffering damages when it let stand the district court's award of such damages based solely on Article 17 of the Warsaw Convention. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995).

Similarly, by considering the sufficiency of the evidence to support the award of pre-death pain and suffering damages, the court below necessarily passed upon the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law. *See Arcadia,*

Ohio v. Ohio Power Co., 498 U.S. 73, 77 (1990). Thus, the "substantive issue" presented by the second question in the Petition effectively was addressed by the court below.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in all respects.

Dated: December 27, 1996

Respectfully submitted,

George N. Tompkins, Jr.
Andrew J. Harakas*
TOMPKINS, HARAKAS, ELSASSER
& TOMPKINS
Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Attorneys for Petitioner
KOREAN AIR LINES CO., LTD.

* *Counsel of Record*

Of Counsel:

Joseph F. Berrafati